United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1219

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1219

UNITED STATES OF AMERICA,

Appellee,

-v.-

ARIEL POMARES and ANTONIO VECIANA,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

REPLY BRIEF IN BEHALF OF APPELLANTS
ARIEL POMARES and ANTONIO VECIANA

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REPLY BRIEF IN BEHALF OF APPELLANTS ARIEL POMARES and ANTONIO VECIANA

POINT I.

THE GOVERNMENT WRONGFULLY VIOLATED ITS PRE-TRIAL STIPULATION AND THEREBY IMPROPERLY PREJUDICED BOTH DEFENDANTS.

The Government characterizes as "frivolous" our contention that, prior to trial, the Government had waived any right it might have had to reveal to the jury the fact that Pomares had allegedly made a confession to the authorities following his arrest (Gov.

Br. p. 12). The Government's response engages in a subterfuge to an even greater extent than that in which it indulged at the trial court level.

A. The Alleged Distinction Between An "Oral" and A "Written" Statement

At the beginning of the trial, Government counsel (Mr. Littlefield) at first denied that any representation had been made by the Government. Then, when confronted with Judge Bonsal's law clerk's notes and with the verbatim transcript of the pre-trial hearing, Government counsel contended that the words which had been used by Mr. Bannigan at the pre-trial conference didn't mean what they said. The Government's contentions in this regard were heatedly rejected by Judge Bonsal who held that it was "clear" (A. 124) that "the Government made a commitment to the defendants' lawyers at this conference, and I am going to make the Government stick with it" (A. 125-126).

Nevertheless, the Government successfully persuaded Judge Bonsal that the Government's waiver by stipulation applied only to a so-called "written" statement. The colloquy at the time of the stipulation reveals that distinction to be a convenient fantasy. At the pre-trial conference, counsel for Veciana stated that there was " . . . a potential severance problem

under Bruton since one of the defendants did give a statement and the other one did not" (A. 19). There was no discussion of a written statement or an oral statement or an oral statement reduced to writing or otherwise. Counsel was clearly referring to the fact that one defendant had allegedly confessed and the other one did not. The prosecutor's immediate response was: "I can resolve that right now. We will not use the statement", and the Court declared the problem resolved (A. 19).

The mental processes of the prosecutor at trial are fairly transparent. Having lost the point on waiver, he created a "written" confession, when it fact there was none, and claimed that the waiver applied only to that "written" confession. In fact, Pomares never wrote any statement nor did he sign any statement written by anyone else. According to Agent Pignol, while Pomares was being questioned, Pignol made "rough notes" (A. 515), which he converted into a written "report" a few days later (A. 515). At trial, Pignol was not sure whether he had destroyed the notes or had left them in Puerto Rico (A. 514). The so-called "written" confession, therefore, was nothing more than Pignol's written recollection of prior events, aided by his "rough" notes.

Under any view of the facts, it is clear that

Pignol's written report could not have been placed in evidence, regardless of whether or not any written stipulation existed, Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99 (1886); United States v. Adams, 385 F. 2d 548, 550 (2nd Cir., 1967); Ahearn v. Webb, 268 F. 2d 45 (10th Cir., 1959); NLRB v. Hudson Pulp & Paper Corp., 273 F. 2d 660, 665 (5th Cir., 1960); NLRB v. Federal Dairy Co., 297 F. 2d 487 (1st Cir., 1962).

At best, Pignol could have taken the stand and testified as to the interview with Pomares. It is absurd to claim that Bannigan, at the pre-trial hearing, was merely referring to the question of whether Pignol's rough notes, revised after the event, would go into evidence.

B. The Alleged Late Discovery of the "Oral" Statement

On this appeal, the Government further fictionalizes these events by claiming that the full complement of Pomares' statements at the time of his arrest had not been known to Government counsel until Agent Pignol arrived in New York during the midst of the trial (Gov. Br. p. 14, fn). There is absolutely no record support for that contention. If we look to the record citation given by the Government (Tr. 450, 451), we find that it is merely an assertion to the court by Mr. Littlefield, the successor-prosecutor, that he did not have an opportunity

to interview Agent Pignol until the midst of the trial, and then, for the first time, discovered the facts upon which his bifurcated confession argument is based. There is no indication in the record as to whether Mr. Bannigan, the prior prosecutor, was aware of this information prior to that time. However, one thing is clear: Agent Bruno, who was the agent who actually conducted the interview of Pomares, is based in New York and worked closely with the prosecutor's office prior to and during the trial (A. 114, 131).

Assuming, arguendo, that Mr. Bannigan did not know, at the time of the waiver, that Pomares had been interviewed over a course of hours, then the waiver should, nevertheless, apply to the totality of Pomares' responses during the interview since: 1) as demonstrated supra and in our main brief, Bannigan waived the right to introduce Pomares' admission; the point at which they were made is irrelevant; moreover, there was no difference in content between the so-called "written" and "oral" admissions; 2) other Government agents did, in fact, possess such knowledge and were easily available to Bannigan before he committed himself to a course of conduct by stipulation; and 3) it would have been absurd for Bannigan to assume that Pomares' statements following his arrest were limited to those which had been noted by Pignol in his report.

C. The Government Does Not, as it Contends, Have a Right to Unilaterally Rescind its Pre-Trial Representations

The Government's brief argues:

> " * * * However, even if the Government had said on the record at a pretrial conference something to the effect that 'we will not use any admissions or confessions, oral or otherwise, by Pomares in this case,' [*] the Government would not necessarily be bound by the statement and could presumably change its mind, unless the defendant could show bad faith on the part of the Government or prejudice to the defendant as a result of his proceeding on the assumption that the confession would not be used (e.g. foregoing a motion to suppress). Appellants in their brief claim they were prejudiced because the confession was strong evidence. Obviously, however, that is not the kind of prejudice required. United States v. Cirillo, [- F. 2d - , slip op. at 3312-3315 (2nd Cir., May 7, 1974)]."

Where the Government enters into a stipulation and then purposely breaches it, the bad faith is obvious. In any event, when the Government stipulates an issue or a fact out of the case, the defendant is improperly prejudiced when the stipulation is unilaterally rescinded. In United States v. Cirillo, cited by the Government, Government counsel, at the time he made a representation to the defense, was laboring under a mistake as to the facts. In the present case, there was no mistake. The so-called "written" statement and

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* We respectfully submit that this hypothetical statement precisely constituted the meaning of Mr. Bannigan's pre-trial representation.

the so-called "oral" statement were both the same in substance. The impropriety was that the Government breached its word.

POINT II.

THE ADMISSIONS OF THE DEFENDANT POMARES WERE NOT SHOWN TO BE VOLUNTARY, AND POMARES WAS NOT PROPERLY ADVISED OF HIS RIGHTS.

The Government contends that Pomares' admissions were "wholly uncoerced"* and that he was properly given the Miranda warnings (Gov. Br. pp. 15-20). In doing so, the Government offers us no authority for the proposition that, when giving the warnings to a person in custody, a Government agent may properly also advise the defendant that "the best lawyer he can ever have was his own person" (A. 512), and "anything he does to help us will in fact be helping him" (A. 570), and "that he was dead and in his own interest he had better come clean" (A. 576), and "pal, we got you and got you good. You are going away for a ton of years" (A. 576).**

Each of the authorities upon which the Government

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* Actually the Government attributes to Judge Bonsal a finding that Pomares' confession was "wholly uncoerced." Judge Bonsal made no such statement.

** These counter-warnings and threats were made not once, but three times (A. 305, 604-605). It is unlikely that the agents would keep repeating these such statements once a suspect has committed himself to confess.

relies are not in point. In United States v. Ferrara, 377 F. 2d 16 (2nd Cir., 1967), which involved a pre-Miranda fact situation, this Court upheld the voluntariness of a confession where a Federal agent had stated to the defendant that "if he cooperated with the United States Attorney I felt sure he would get out on reduced bail." Even there, however, this Court found it necessary to note that the defendant was a recidivist and that he had not been "threatened in any way." The conduct in that case simply cannot be compared to the conduct in this case.

In United States v. Bailey, 468 F. 2d 652, 672-674 (5th Cir., 1972), the defendant, himself, was a police officer. At a point when the defendant was not in custody, he was told by his friend, another police officer, that he could expect a lighter sentence if he plead guilty. In point of fact, as found by the Court in Bailey, the police officer in question was not acting in his role as a police officer, but rather as a friend giving "fatherly advice", 468 F. 2d at 672, and had no intention of interrogating the defendant (468 F. 2d at 673). These factors, combined with the fact that the defendant was not in custody, thoroughly distinguish Bailey from the instant case. Moreover, the defendant in Bailey was not subjected to a series of

counter-warnings by anyone.

In United States v. Springer, 460 F. 2d 1344 (7th Cir., 1972), the Court found that no promise was shown to have been made to the defendant other than that if he did cooperate the fact of cooperation would be made known to the United States Attorney and to the Court, 460 F. 2d 1346-7. The following principal enunciated in that case is, however, clearly applicable to the instant case:

> "The claim here stems from an inarguably correct proposition of law that a confession must not be extracted by implied promises, however slight, Bram v. United States, 168 U.S. 532, 542-3 (1897)." 460 F. 2d at 1346

In United States v. Frazier, 434 F. 2d 994 (5th Cir., 1970), it was similarly found that the interrogating agents merely advised the defendant "that if he cooperated with them his cooperation would be known to the United States Attorney, that there might be some consideration given by the United States Attorney but that the agents could make no promises" 434 F. 2d at 995-6.

In United States v. Anderson, 394 F. 2d 743 (2nd Cir., 1968), no issue was presented or discussed as to whether counter-warnings or threats had been made to the defendant. The case is simply not relevant.

In United States v. Williams, 479 F. 2d 1138, 1140 (4th Cir., 1973), the interrogating agent merely suggested to the defendant that he "try to help himself"; in United States v. Glasgow, 451 F. 2d 557 (9th Cir., 1971) at 558, the interrogating officer merely advised the defendant, a person with an "extensive prior criminal record" that the Court and the prosecuting authorities would be advised if the defendant cooperated.

In view of our analysis of the cases upon which the Government relies, it can safely be said that no conduct of the type admitted by the Government to have occurred in the present case has ever been held proper by this or any other Court. To the contrary, Miranda and the other authorities cited in our main brief clearly require the suppression of the confession.

POINT III.

THE GOVERNMENT DEPRIVED THE DEFENDANT POMARES OF HIS RIGHT TO REMAIN SILENT WHEN IT ELICITED FROM AGENT PIGNOL THE FACT THAT POMARES REFUSED TO SIGN ANY STATEMENT OR FURTHER COOPERATE WITH THE GOVERNMENT.

The Government concedes that it was error for the Government to elicit from Pignol that Pomares stopped "cooperating", and, when contacted by the agent, said that he would cooperate only if given im-

munity (Gov. Br. p. 20). Nevertheless, the Government argues, this conceded error was harmless.

The Government's first line of argument is that the jury probably didn't hear the testimony!, but that if it did, then the mere fact that the defendant was standing trial implicitly indicated to the jury that Pomares had refused to further cooperate (Gov. Br. p. 20). We find it incredible that this Court would permit such speculative nonsense to overlook the conceded violation of a constitutional right. How can such a rationale support a finding that the error was "harmless beyond a reasonable doubt" Chapman v. California, 386 U.S. 18, 24 (1967)?

Citing Haberstroh v. Montanye, 493 F. 2d 483, 485 (2nd Cir., 1974), a habeas corpus review of a State conviction, the Government then argues that Pignol's testimony in this regard "did no more damage to Pomares than already existed with Agent Pignol's entire proper testimony about Pomares' confession and agreement to cooperate" (Gov. Br. p. 20). See: Helton v. United States, 221 F. 2d 338, 340-42 (5th Cir., 1955).

To the contrary, Pignol's testimony clearly indicated to the jury that, by refusing to further cooperate, and by requesting immunity, through his lawyer, the defendant had confessed to his lawyer, thus corroborating the truth of the agents' allegations that Pomares had made a confession in the first place. Revelation of this information clearly strengthened the fabric of the Government's case against the defendant by means of using his exercise of Fifth Amendment privilege

against him. See: Deats v. Rodriguez, 477 F. 2d 1023 (10th Cir., 1973); People v. Christman, 23 N.Y. 2d 429, 297 N.Y.S. 2d 134 (1969).

POINT IV.

THE JURY SHOULD HAVE BEEN CHARGED, AS REQUESTED BY THE DEFENSE, THAT IF THEY FOUND THE ALLEGED POMARES STATEMENT UNRELIABLE, THEY WERE ENTITLED TO COMPLETELY DISREGARD IT.

While giving lip service to the holding of Leggo v. Twomey, 404 U.S. 477 (1972), the Government argues that counsel for Pomares sufficiently advised the jury that "because of the circumstances of the making of the alleged confession . . . they could, and should, ignore the confession entirely" (Gov. Br. p. 22). This, according to the Government's reasoning, made it unnecessary for the trial judge, in his charge, to specifically so charge the jury.

We respectfully submit that if a jury has such a right, as Leggo makes clear, then it should be told of that right in no uncertain terms. Since the trial Judge was specifically requested to do so, but did not, the conviction should be reversed.

POINT V.

THE DEFENDANT VECIANA SHOULD HAVE BEEN GRANTED A SEPARATE TRIAL FROM THE DEFENDANT POMARES.

Our argument is that the introduction of Pomares'

alleged confession into evidence operated as strong corroborative evidence for the testimony of the accomplice Barres, thus violating the rights of the defendant Veciana under Bruton v. United States, 391 U.S. 123 (1968). The chief issue in this case was whether Barres was telling the truth as to the alleged involvement of Veciana. The Government's reliance upon United States v. Trudo, 449 F. 2d 649 (2nd Cir., 1971), cert. denied, 405 U.S. 926 (1971), is misplaced. There, the issue was whether an alleged confession, which had been redacted, nevertheless improperly fleshed out circumstantial evidence against a non-confessing defendant. The issue in the present case is significantly more substantial. Here, we respectfully submit, it was impossible for the jury not to take Pomares' confession as evidence of the credibility of Barres. Without that confession, the Government's case against Veciana was completely dependent upon Barres' uncorroborated word. Pomares' confession, however, although it was silent as to any participation on the part of Veciana, indicated to the jury that Barres was willing to give up his true confederates. Since Pomares did not testify, Veciana was completely deprived of any opportunity to challenge the truth of such apparently corroborative evidence. For that reason, he should have been granted a severance.

POINT VI.

REVERSAL IS REQUIRED BECAUSE OF THE GOVERNMENT'S ARGUMENT IN SUMMATION THAT THE DEFENDANTS SHOULD HAVE COOPERATED WITH THE GOVERNMENT, AS DID THE GOVERNMENT WITNESS, INSTEAD OF PROTESTING THEIR INNOCENCE.

The Government states that the prosecutor's argument was "inadvisable" (Gov. Br. p. 24), that it constituted an appeal to the jury's fear of "future inchoate crimes involving cocaine", and that "the trial court properly instructed the jury to disregard the prosecutor's comment" (Gov. Br. p. 25). Moreover, notwithstanding the fact that the prosecutor, immediately following the rebuke by the court, contrasted the defendants' non-cooperation with the cooperation of the Government's chief and indispensible witness, the Government argues that this was a proper means of shoring up the credibility of that witness (Gov. Br. p. 25).

We respectfully submit that the Government has failed to establish that this criticism of the defendants' exercise of the Fifth Amendment right was not harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 24 (1967). Unlike the usual such comment which, though objectionable, is solely a reference to a defendant's failure to speak out in his own defense, the prosecutor's argument here had the additional twofold purpose of appealing to the jury's fears and but-

tressing the credibility of the Government's witness.

POINT VII.

THE PROSECUTOR'S SUMMATION WITH REGARD TO THE TESTIMONY OF THE WITNESS LOPEZ IMPROPERLY DISTORTED THE TESTIMONY AND WAS A VIOLATION OF THE RIGHTS OF THE DEFENDANT POMARES UNDER BRUTON V. UNITED STATES, 391 U.S. 123.

Based upon the facts of this case, the Government claims the right to attack a defendant and claim consciousness of guilt merely because the defendant interviewed a witness. As shown in our main brief, at pp. 54-56, the testimony is clear that Veciana unequivocally advised the witness that the witness should only tell the truth. If the evidence in this case, as to that conversation, indicates a consciousness of guilt or impropriety, then the constitutional right to call witnesses in one's behalf is meaningless. The prosecutor's argument was nothing less than an attempt on the part of the prosecutor to capitalize upon the natural resistance which jurors may have to the presumption of innocence.

The only purpose which the prosecutor's argument could have served, as admitted in the Government's brief, at pp. 25-27, was to argue that this was an admission on the part of Veciana that he and Pomares were engaged in the illegal activity charge. We respectfully submit that this was a violation of the Bruton principal and that

there is no factual analogy to the cases cited by the Government.

POINT VIII.

THE GOVERNMENT IMPROPERLY EXPANDED THE SCOPE OF THE INDICTMENT.

The Government distorts our argument by claiming:

> "Appellants further argue that since the earlier shipments were not charged as substantive counts in the indictment no testimony about them should have been allowed. This is frivolous. It was obviously not possible for the Government to charge defendants with the substantive distribution of the 5 kilograms from the first shipment or the 10 kilograms from the second shipment because nothing in connection with either of those shipments took place in the Southern District of New York." (Gov. Br. p. 30, fn) [Emphasis added]*

We have made no claim that the prior alleged criminal acts had to be charged as substantive counts. Since the Government claimed those acts, which formed a substantial part of the Government's proof at trial, were part of the conspiracy, then they should have been specified in the conspiracy count, or, at the very least, the defense should have been given advance notice. If

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* The Government's argument to the jury was somewhat different: "Well, of course, they are not spelled out in the indictment. We don't have the cocaine" (A. 706).

the Government's tactic in this regard is upheld, then defendants in conspiracy cases are placed in the impossible position of not having any opportunity to prepare for trial.

For the reasons set forth in our main brief, at pp. 60-64, the admission of that testimony was error. It did not have as its function proof of "the existence and aim of the conspiracy charged" United States v. Cohn, 489 F. 2d 945, 949 (2nd Cir., 1973), or, as stated in United States v. Cioffi, Docket No. 73-2612 (2nd Cir., March 14, 1974), slip op. p. 2232, did it tend to enhance the Government's proof as to "the intent, purpose and aim of the parties to the conspiracy." If the jury believed the Government's witness, Barres, in his allegations as to the criminal transactions specified in the indictment, then the defendants' state of mind and objective were clear. Nothing Barres said with regard to the alleged prior transactions in any way enhanced the Government's proper proof in that regard. The true objective and realistic effect of the Government's additional proof was to impress upon the jury not the fact of defendants' participation, but rather to prey upon the jurors' emotions by depicting a scene of large-scale narcotics traffic. This was an objective upon which the prosecutor sought to capitalize in his concededly impro-

per remarks in summation (Point VI, supra, p. 14).

POINT IX.

IN HIS SUMMATION, THE PROSECUTOR ENHANCED THE CREDIBILITY OF THE PROSECUTION WITNESS, BARRES, BY PLACING ALLEGED FACTS BEFORE THE JURY, ALTHOUGH THOSE FACTS HAD NOT BEEN THE SUBJECT OF EVIDENCE

The Government argues that the jury knew that Barres had made a statement to the authorities upon his arrest and that "any specific references [in the prosecutor's summation] to details of the confession were to facts already in evidence" (Gov. Br. p. 27). This last allegation is false.

What the jury knew and did not know is set forth in our main brief at pp. 65-66. While the jury knew that Barres had made a statement,* hardly any of the details of that statement were in evidence.

As already noted, a substantial portion of Barres' trial testimony related to the two transactions not charged by the indictment. Nowhere in his testimony or in any other aspect of the evidence in this

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* The Government's wishy-washy equivocal approach to facts and the meaning of words is made apparent by the contrast between its treatment of the Barres "statement" given over a period of days, as being one cohesive whole, and its treatment of the Pomares "statement" given over a period of a few hours (see Point I, supra).

case was there any indication that he had described those transactions to the agents after his arrest. With regard to those prior transactions, the Government argues:

> "Despite appellants' allegation, there is no statement in the summation to the effect that Barres necessarily told the agents about the two earlier shipments immediately upon his arrest . . .." (Gov. Br. p. 28, fn)

This assertion by the Government is absolutely incredible. At pp. 67-68 of our main brief, we set forth an extract from the prosecutor's summation which, inter alia, included the following assertions:

> " * * * He [Barres] told the Government about the fact that he had been involved in two previous shipments of 5 kilos and 9 and a half or 10 kilos. The Government didn't know anything about that. * * * You are certainly not going to say, 'yes, sure enough, I did 5 other kilos a year before, and I did 10 other kilos six months before.' " (A. 703)

* * *

> "It's at that point [i.e., upon his arrest] that Barres just opens up. Barres tells about the 3 kilos, tells about Veciana, tells about Pomares, tells about everything that happened. He tells about the other 2 shipments. I reiterate, why in the world would he tell about these other 3 kilos? Why would he incriminate himself about these other 5 kilos, and the other 9 and a half kilos if it weren't the truth right down the line?" (A. 722)

As exemplified by the above quoted portions of the prosecutor's summation, as well as the other items noted in our main brief, the prosecutor clearly testified to the jury that Barres' post-arrest statement included prior consistent statements which were not otherwise before the jury. For that reason, the judgments of conviction should be set aside.

CONCLUSION

For all of the above reasons, as well as those advanced in our main brief, the judgments of conviction should be reversed.

Respectfully submitted,

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